FILE COPY

Office Supreme Court, U.S.
FILED
JUN 12 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 1008 147

ROY CLIPPINGER; J. MADISON POMEROY; AND CARMI TIMES PUBLISHING COMPANY, A CORPORATION,

Petitioners,

vs.

UNITED STATES OF AMERICA AND WHITE COUNTY BRIDGE COMMISSION, IN THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Enos L. Phillips,
Herschel C. Timmerman,
Urbana, Illinois,
Attorneys for Roy Clippinger and Carmi Times Publishing Company.

Ivan A. Elbert,
Ivan A. Elbert, Jr.,
Carmi, Illinois,
Attorneys for J. M[illegible] Pomeroy.

INDEX.

	PAGE
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement	3
Reasons for Granting the Writ	5
Conclusion	16
Appendix	17
Opinion of the District Court	17
Opinion of the United States Circuit Court of Appeals, 7th Circuit	22
Opinion of the United States Circuit Court of Appeals, 7th Circuit, on Petition for re-hearing	32
Public Law 37 (55 Stat. 140)	34

Citations.

Cases.

Beacon Theatres v. Westover, 359 U. S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988, 992, 997	7
Black v. Boyd, C. A. 6th, 1957, 248 Fed. 2d 156, 161-162	6
Bradley v. U. S., C. A. 5th, 1954, 214 Fed. 2d 5, 7	6
DiGiovanni v. Camden Fire Insurance Company, 296 U. S. 64; 80 L. Ed. 47	7
Ex Parte Crane, 30 U. S. 190; 8 L. Ed. 92	10
Grand Chute v. Winegar, 82 U. S. 373; 21 L. Ed. 174	7

Humble Oil & Refining Co. v. Sun Oil Co., C. A. 5th, 1951, 191 Fed. 2d 705, 710-711, Certiorari denied, 343 U. S. 920, 96 L. Ed. 687 6

Kendall v. U. S. ex rel. Stokes, 37 U. S. 524; 9 L. Ed. 1181 10

Memphis & St. Louis R. R. Co. v. Loftin, 105 U. S. 258 at 260, 26 L. Ed. 1042 at 1043 14

Pacific Railroad of Missouri v. Missouri Pacific Ry. Co., Cornelius K. Garrison, et al., 111 U. S. 505 at 518, 28 L. Ed. 498 at 502 14

The People v. Graber, 394 Ill. 362, p. 370 11

Riggs v. Johnson County, 73 U. S. 166, 18 L. Ed. 768 .. 10

Root v. L. S. & M. S. R. Co., 105 U. S. 189; 26 L. Ed. 975 7

Stainback v. Mo Hock Lok Ke Po, 336 U. S. 368, 93 L. Ed. 740, 751 headnote 8, footnote 26 6

Thomson v. Gaskill, 315 U. S. 442 at 446, 86 L. Ed. 951 at 955 14

Walkley v. City of Muscatine, 73 U. S. 481; 18 L. Ed. 930 10

Yost v. Dallas County, 236 U. S. 50; 59 L. Ed. 460 12

Statutes.

Constitution of the United States, VII Amendment .. 2

Public Law 37 (55 Stat. 140)

Section 8 2

Section 11 3

Section 12 3

Text.

Barron and Holtzoff, Fed. Rules of Civil Procedure, Vol. 1, pp. 260-261 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. .....

ROY CLIPPINGER; J. MADISON POMEROY; AND CARMI TIMES PUBLISHING COMPANY, A CORPORATION,

Petitioners,

vs.

UNITED STATES OF AMERICA AND WHITE COUNTY BRIDGE COMMISSION, EX REL. UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Roy Clippinger, J. Madison Pomeroy and Carmi Times Publishing Company, a corporation, both jointly and severally, petition for a writ of certiorari to review a decision and order of the United States Court of Appeals for the Seventh Circuit reported in 275 Fed. 2d page 529 through 536.

JURISDICTION.

The order of the Court of Appeals (App. 22), affirming in part and reversing in part the judgment of the District Court, was entered on January 11, 1960, and a timely petition for rehearing was denied on March 21, 1960 (App. 32). The jurisdiction of this Court is invoked under Title 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

Whether these defendants can be denied their right to a jury trial by the decision of the Court of Appeals which construes the complaint as alleging an insufficient, or an incidental and secondary, or separable suit in equity, when the complaint prays only for money damages and attempts to set forth essentially a legal claim triable, as of right, by jury.

Whether the United States can, under the provisions of Public Law 37, sue these defendants for money damages.

Whether the Court of Appeals can properly consider the report of a Select Committee of Congress when it is *dehors* the record on appeal and consider the transcript and findings thereon in aid of the complaint stricken by the District Court for insufficiency.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution of the United States, VII Amendment.

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The pertinent provisions of an Act of April 12, 1941, Public Law 37, 55 Stat. 140, are as follows:

> "Sec. 8. For the purpose of carrying into effect the objects stated in this Act, there is hereby created the White County Bridge Commission, and by that name, style, and title said body shall have perpetual succession; may contract and be contracted with, sue and be sued, implead and be impleaded, complain and defend in all courts of law and equity; may make and have a common seal; may purchase or otherwise ac-

quire and hold or dispose of real estate and other property; may accept and receive donations or gifts of money or other property and apply same to the purposes of this Act; and shall have and possess all powers necessary, convenient, or proper for carrying into effect the objects stated in this Act."

"Sec. 11. Nothing herein contained shall be construed to authorize or permit the commission or any member thereof to create any obligation or incur any liability other than such obligations and liabilities as are dischargeable solely from funds provided by this Act. No obligation created or liability incurred pursuant to this Act shall be an obligation or liability of any member or members of the commission but shall be chargeable solely to the funds herein provided, nor shall any indebtedness created pursuant to this Act be an indebtedness of the United States."

"Sec. 12. All provisions of this Act may be enforced or the violation thereof prevented by mandamus, injunction, or other appropriate remedy brought by the attorney general for the State of Illinois, the attorney general for the State of Indiana, or the United States district attorney for any district in which the bridge may be located in part, in any court having competent jurisdiction of the subject matter and of the parties."

And the entire Public Law 37 is set forth in Record Appendix B, page 28.

STATEMENT.

The Third Amended Complaint in this cause rests jurisdiction upon U. S. C. A. Sec. 1345 and Public Law 37, 77th Congress, Act of April 12, 1941, 55 Stat. 140. The plaintiff abandoned all earlier complaints filed and finally brings the action in the name of the United States of America and on relation of the United States of America.

Plaintiff alleges that the defendant, Roy Clippinger, is a Commissioner of the White County Bridge Commission.

Mr. Clippinger's affidavit denying this charge was filed in support of his motion, and the plaintiff abandoned its claim that he was or had been a Commissioner. Plaintiff fails to allege any status or relationship of the defendant, The Carmi Times Publishing Compan,.

Plaintiff in its complaint seeks neither mandamus nor injunction. The prayer of the complaint is for money damages against all defendants jointly and the removal of a Commissioner. The complaint prays damages against the defendants (including the White County Bridge Commission) for and on behalf of the White County Bridge Commission; yet, the action is brought on relation of the United States of America and not of the White County Bridge Commission. (Exhibit B to the Third Amended Complaint summarizes the claim for the money damages sued for.)

Both the District Court and Court of Appeals decided that removal of a Commissioner was improper, and this decision is not appealed from by the Plaintiff.

All defendants are dealt with jointly, and the defendant, Roy Clippinger, who is not now and who never has been a Commissioner, and the defendant, Carmi Times Publishing Company, which is not clearly identified with the allegations, are charged with the same allegations as the White County Bridge Commission and the Commissioners thereof.

The Third Amended Complaint was dismissed by the District Court on the joint and several motions of all defendants (App. 17).

Plaintiff appealed to the United States Court of Appeals for the Seventh Circuit and that Court reversed the District Court in part holding, in substance, that although the plaintiff asked for no such relief, it was entitled to equitable relief by way of injunction against Commissioner

Pomeroy and the Commission, providing the plaintiff should establish a substantial portion of the findings of The Select Committee of Congress. Yet, the findings of this Select Committee were entirely *dehors* the record on review and were never before the District Court whose judgment was subjected to the appeal.

The opinion of the Court of Appeals on the petitions for rehearing held that the complaint stated an equitable claim against Pomeroy and the Commission and then proceeded to hold that none of the defendants would be entitled to a trial by jury even though the only relief which is asked for or could be granted as to Clippinger and the Carmi Times Publishing Company is a judgment for money damages.

REASONS FOR GRANTING THE WRIT.

The Court of Appeals construed the complaint by holding that it alleged a suit in equity for injunction against the White County Bridge Commission when the complaint clearly did not set forth grounds for equitable relief or an injunction and was simply a complaint for money damages against these defendants. The defendants are entitled to a jury trial as a matter of right, and the Court of Appeals in denying them this constitutional right has decided an important question of federal law under Public Law 37 which has not been, but which should be, settled by this Court.

It is clear that the decision of the Court of Appeals would absolutely deny defendants the right to a jury trial. The Court of Appeals on denial of petition for rehearing stated:

> Petitioners proceed on the assumption that the complaint herein states a legal claim or possibly a claim for equitable relief in aid of the legal action. This assumption rests on a misinterpretation of this court's

decision. The basis of this claim lies in equity, and the remedy is equitable. There is no constitutional right to a trial by jury in an equitable action.

It is inconceivable how the Court reached this result when the action had never been considered by anyone as anything but an action for money damages until the Court of Appeals filed its decision.

The Plaintiff's complaint asked for damages. It did not even purport to attempt to set out a cause of action for injunction, and prayed for none. The whole basis of the action was to recover moneys alleged to have been an unjust enrichment to defendants.

This is an action at law for money damages against these defendants in an amount in excess of Twenty Dollars, and these defendants' right to a trial by jury is preserved by the Seventh Amendment to the Constitution of the United States. These defendants are entitled to such jury trial according to the rules of the common law and this is preserved to them by the Constitution.

The Federal Rule that there shall be one form of action to be known as "civil action" is one of procedure and does not eliminate the substantive distinctions between equitable and legal remedies. "The substantive principles of equity for balancing rights and obligations are not superseded." Barron and Holtzoff, Fed. Rules of Civil Procedure, Vol. i, pp. 260-261; *Stainback* v. *Mo Hock Lok Ke Po*, 336 U. S. 368, 93 L. Ed. 740, 751, headnote 8, footnote 26; *Humble Oil & Refining Co.* v. *Sun Oil Co.*, C. A. 5th, 1951, 191 Fed. 2d 705, 710-711, Certiorari denied, 343 U. S. 920, 96 L. Ed. 687; *Bradley* v. *U. S.*, C. A. 5th, 1954, 214 Fed. 2d 5, 7; *Black* v. *Boyd*, C. A. 6th, 1957, 248 Fed. 2d 156, 161-162.

In delegating to the Supreme Court responsibility for drawing up rules, Congress declared that: "Such rules

shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.'" 28 U. S. C. Sec. 2072.

Since the essential character of the action is legal, right to jury trial cannot be denied even though the case had equitable issues. *Beacon Theatres* v. *Westover*, 359 U. S. 500, 79 S. Ct. 948, 3 L. ed. 2d 988; *Root* v. *L. S. & M. S. R. Co.*, 105 U. S. 189; 26 L. ed. 975; *Grand Chute* v. *Winegar*, 82 U. S. 373; 21 L. ed. 174; *Di Giovanni* v. *Camden Fire Insurance Company*, 296 U. S. 64; 80 L. ed. 47.

The right to jury trial will be granted where the essential remedy is at law even though federal jurisdiction will be thereby defeated. *Di Giovanni* v. *Camden Fire Insurance Company*, 296 U. S. 64, 80 L. ed. 47. This disposes of the Court of Appeals comment that defendants "fail to point out a legal remedy maintainable *in the federal courts* adequate to restrain alleged facts constituting continuing violations of the law by the Commission and other defendants, or to protect the public interest" (emphasis supplied). These defendants have always maintained that if there is any cause of action under Public Law 37, it is for mandamus to the Bridge Commission directing it to act. The conceded law that the District Court does not have original jurisdiction in mandamus does not give the right to circumvent this limitation by switching to equity. Mandamus is still available in the state court and the District Attorney is specifically authorized access to state courts by Public Law 37.

The Circuit Court of Appeals has flagrantly violated a rule of long standing recently reiterated in *Beacon Theatres* v. *Westover*, 359 U. S. 500; 79 S. Ct. 948; 3 L. ed. 2d 988, 992, 997:

> "* * * We granted Certiorari * * * because 'Maintenance of the jury as a fact-finding body is of such

importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care'." *Dimick v. Schiedt*, 293 U. S. 474, 486 * * *

"* * * As this Court said in *Scott v. Neely*, 140 U. S. 106, 109 * * *: 'In the Federal Courts this (jury) right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency'."

Even if plaintiff had attempted to claim a right to an injunction there would be a right to a jury trial of the issues at law. It must always be remembered that the plaintiff did not ask for injunction, did not attempt to allege the type of facts and issues found in a complaint for injunction and that the crutch of injunction as equitable relief with restitution incidental thereto was first injected into the case by the decision of the Court of Appeals in construing the complaint. The Court of Appeals in its opinion on petitions for rehearing proceeded to announce the law in this case that these defendants would have no constitutional right to a trial by jury in this case.

The plaintiff has filed three amended complaints. It has had time, opportunity and education by argument of motions to polish the complaint so it states the purported cause of action in the best way it can.

It asks for a judgment for damages. (The only equitable relief requested was for removal of a commissioner and this was decided adversely to the Plaintiff by both lower courts.) The complaint not only does not pray for injunction, but also it lacks the allegations usually found in such a complaint: Inadequacy of remedy at law, irreparable damage, continuing nature, threats of continuing breaches.

How can it be said that there is a cause of action alleged

against the one commissioner a party to the suit, J. Madison Pomeroy?

The three original commissioners were named by Congress: Julius C. Kern, Jennings F. Martin and J. Madison Pomeroy. The first two are deceased and the plaintiff has conceded the dismissal of their estates from this action. At one time Ulys Pyle, a present replacement commissioner, was a party defendant. His dismissal was also conceded by the plaintiff. The third present commissioner has never been a party to this suit.

What equitable relief could be ordered against Pomeroy? According to the theory advanced by the Court of Appeals, he could be enjoined to recover funds paid out as unjust enrichment and to allocate them to the use of the bridge. What could Pomeroy do in this regard when he is only one vote on a commission of three?

What equitable relief could be ordered against Roy Clippinger or the Carmi Times Publishing Company? The only order or judgment which is asked for or could be entered against either of them—assuming proof of the complaint—is to repay funds which unjustly enrich them. This is certainly not an equitable type order but would be a pure money judgment.

We fail to see how the complaint can be construed to state an equitable cause of action against J. Madison Pomeroy, Roy Clippinger, or the Carmi Times Publishing Company. The only possible equitable relief which the complaint ever stated was the purported action for removal of the Commissioner. This has been dismissed from the complaint by the decision of the District Court and the Court of Appeals and the plaintiff has not appealed from this decision. That which remains is purely an action for money damages.

The complaint does not allege a cause of action for injunction against the White County Bridge Commission.

The charges in the complaint of breach of a duty must be alleged against the individuals. The duty would be owed to the White County Bridge Commission, a *quasi* public corporation, as a representative of the public. Any vague charges of breach must be directed against the other defendants and, therefore, cannot sustain a cause of action against the White County Bridge Commission.

What parts of the complaint can be allegations against the White County Bridge Commission? By implication, it could be that it has not, as a body corporate, sued to recover moneys and has not properly maintained the bridge. Both of these functions are discretionary ones and could be compelled by the District Attorney in a suit for mandamus. *Exparte Crane*, 30 U. S. 190; 8 L. Ed. 92; *Kendall* v. *U. S. ex rel. Stokes*, 37 U. S. 524; 9 L. Ed. 1181; *Riggs* v. *Johnson County*, 73 U. S. 166, 18 L. Ed. 768. Injunction will not lie to take the place of mandamus. *Walkley* v. *City of Muscatine*, 73 U. S. 481; 18 L. Ed. 930. This should not be altered by the jurisdictional limitation on mandamus in the Federal District Court. The District Attorney never has asked directly for mandamus and does not contend for mandamus. He wants an action himself for damages or nothing. The Court of Appeals and the District Court agreed that he could not bring an action for damages. We agree. This leaves the District Attorney nothing in Federal Court—but does *not* leave the plaintiff without a remedy. The proper remedy is to bring mandamus in the State Courts or to seek a change in the laws of Congress.

Public Law 37 presents a federal question which the Court of Appeals has decided in a way in conflict with applicable decisions of this Court.

A careful analysis of the allegations in the Third Amended Complaint reveals that the plaintiff is alleging the Commissioners of The White County Bridge Commission have breached their duties and obligations and their

oath under Public Law 37. The complaint does not, and for that matter, could not well allege that Mr. Clippinger, who was not a Commissioner, and the Carmi Time Publishing Company, who was also not a Commissioner, violated any duty or obligation placed upon them by Public Law 37. In effect, the plaintiff is seeking a money judgment against all defendants, including Roy Clippinger and the Carmi Times Publishing Company, on the assertion that the Commissioners have, in the judgment of the United States District Attorney, failed to properly perform their duties as Commissioners. Certainly, it is not and could not be contended that the White County Bridge Commission is not a duly established and fully competent corporate body politic. By virtue of Section 8 and other Sections of Public Law 37, this Commission had full discretion and authority necessary for the routine operation of the bridge and to carry into effect the objects and purposes of Public Law 37.

The actions and discretion of the White County Bridge Commission were not, by Congress, subjected to review by the United States District Attorney or by the Courts. The general rule is stated in *The People* v. *Graber*, 394 Ill. 362, p. 370:

> "The general doctrine is well established that an officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion which the law gives to him as a part of his official functions; the reason for this being that the law reposes this discretion in him for that occasion and not in the Courts."

Even the Court of Appeals recognizes that the Federal jurisdiction provided by Section 12 of Public Law 37 is quite limited and exists in this action *only* if it be an action for injunction. In other words, factual allegations in support of an asserted right to and prayer for injunction whereby the "provisions of this act may be enforced or the

violation thereof prevented" are essential jurisdictional allegations. They are not allegations within or that can be excused by the pleading tolerances now authorized by the Federal rules of Civil Procedure "as a means of arriving at fair and just settlements between litigants."

If the defendants, Clippinger, or the Carmi Times Publishing Company, have failed in any obligations or duties undertaken by them in their dealings with the White County Bridge Commission, the White County Bridge Commission is fully authorized and empowered by law to pursue its remedy and perform every act and deed necessary to fully carry into effect all of its contracts and all of the provisions of Public Law 37. Its actions and doings and deeds are not subject to the whim or control of the United States District Attorney.

If the United States District Attorney has cause to believe that the Commissioners of the White County Bridge Commission are not fully, faithfully and properly performing their duties to such an extent that some action is needed to enforce or prevent the violation of any provision of Public Law 37, the Congress of the United States provided adequate remedy for such a situation. This is proved in Section 12, Public Law 37, and in this situation would be by mandamus in the State Court.

A Missouri statute very similar to Section 12 of Public Law 37 was construed by the United States Supreme Court in the case of *Yost* v. *Dallas County*, 236 U. S. 50; 59 L. Ed. 460. In this case a question of taxation was involved and the Missouri Statute with reference to enforcement used the language: "By mandamus or otherwise." And the Supreme Court in holding that this sort of language did not go beyond mandamus to permit a collection of the tax by the plaintiff used the following language at page 465 (L. Ed.):

"* * * The fact that it falls upon people who are not

parties to the contract or the suit is an additional consideration in favor of the result; which no one would doubt if the judgment had been recovered and the present proceeding brought in another state. Of course it does not follow from the fact that a court has authority to issue a writ of mandamus to compel officers to perform their duty that it can perform that duty in their place. Authority is given by Missouri Rev. Stat. 1909, Sec. 11,417, to the circuit court to enforce 'by mandamus or otherwise' an order to the county court to have the tax assessed, etc. But the words 'or otherwise' do not authorize the circuit court to collect the tax, but only allow the resort to other means beside mandamus to compel the county court to do so. At least until the supreme court of Missouri says otherwise, we should read them in that sense. We answer both questions: No."

In the instant case the United States District Attorney is by Section 12, Public Law 37, empowered to bring action for mandamus or injunction to require the Commissioners to perform their duties and to enforce and prevent violation of the provisions of Public Law 37. This does not mean, and Congress did not intend, that the United States District Attorney could, by an action such as this, take over the management of the affairs of the Commission and perform the duties of the Commissioners as he might deem expedient. Unquestionably, the White County Bridge Commission has full legal power and authority to do any and all acts necessary, convenient and proper, to carry into effect the purposes of Public Law 37. The Commissioners have this right—they have this duty! If the Commissioners have failed in their duty, the District Attorney, by mandamus in the State Court, can compel proper performance. Certainly, the District Attorney is not authorized to perform the duties and assume the obligations of the Commissioners. Congress committed these duties and powers to the Commissioners, and empowered the District

Attorney to employ a mandamus proceeding in a proper case.

The Court of Appeals has departed from the accepted and usual course of judicial proceedings and has so far departed therefrom as to call for an exercise of this Court's power of supervision.

An Appellate Court should consider nothing that is not contained in the record and should confine itself scrupulously to the matters disclosed by the record and inferences which may legitimately be drawn therefrom. Matters *de hors* the record must be disregarded on appeal. *Pacific Railroad of Missouri* v. *Missouri Pacific Ry. Co., Cornelius K. Garrison, et al.*, 111 U. S. 505 at 518, 28 L. Ed. 498 at 502; *Thomson* v. *Gaskill*, 315 U. S. 442 at 446, 86 L. Ed. 951 at 955; *Memphis & St. Louis R. R. Co.* v. *Loftin*, 105 U. S. 258 at 260, 26 L. Ed. 1042, at 1043.

A dangerous precedent is established when an Appellate Court goes afield of the record on review and decides the issues upon appeal by looking at matters outside the record and particularly where those matters are such that they are not competent evidence and would constitute hearsay in any trial between the parties involved.

The decision of the Court of Appeals and the reasoning of the Court in construing the Third Amended Complaint in this case was influenced largely by the report of the Select Committee of Congress referred to in the opinion.

Surely the time has not come in Court when the rights of the litigants are to be determined on the basis of an investigation conducted by a legislative tribunal. The opinion of the Court of Appeals filed on January 11, 1960 in effect states that the Select Committee has reported matters which in the opinion of the Court might constitute a cause of action against the defendants. The function of the Court of Appeals was to decide whether or not the

Third Amended Complaint as set forth in the record stated a cause of action against these defendants without regard to matters outside the record.

This report, referred to in the opinion of the Court of Appeals, in this cause was apparently a report of a Committee of Congress upon hearings which were not conducted in judicial proceedings. This report could not possibly be admitted in evidence in the cause even if the complaint were sufficient. As a matter of fact, this report and its recommendations were never adopted by Congress; however, we deem this to be immaterial to this cause. If all references and all consideration given by the Court of Appeals to the report of this Select Committee are deleted from the opinion of the Court of Appeals as they should by law be, then there is no basis at all upon which the opinion of the Court of Appeal can be justified. The complaint neither states a cause of action for injunction or other equitable relief, nor does the complaint pray for such relief.

Public Law 37 provides no basis for an equitable action or for an action of injunction against Roy Clippinger, J. Madison Pomeroy or The Carmi Times Publishing Company under the Third Amended Complaint. The decision of the Court of Appeals goes afield from the matters presented to it in the record on appeal to arrive at the conclusion that: "* * * The complaint, therefore, states an equitable claim against Commissioner Pomeroy as well as against the Commission." Even the Court of Appeals did not hold that there was any equitable claims stated against the defendants, Roy Clippinger and The Carmi Times Publishing Company.

CONCLUSION.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted, the opinion of the United States Court of Appeals for the Seventh Circuit should be reversed, and the decision of the District Court for the Eastern District of Illinois affirmed.

Respectfully submitted,

ENOS L. PHILLIPS,
HURSHAL C. TUMMELSON,
Urbana, Illinois,
Attorneys for Roy Clippinger and Carmi Times Publishing Company,

IVAN A. ELLIOTT,
IVAN A. ELLIOTT, JR.,
Carmi, Illinois,
Attorneys for J. Madison Pomeroy.

APPENDIX.

(Caption omitted)

(Filed March 5, 1959)

MEMORANDUM AND ORDER OF DISTRICT COURT.

The United States of America has filed a third amended complaint and again the defendants have filed a motion to dismiss for various reasons, including the ground that this court does not have jurisdiction to grant any relief. The present action is entitled "*United States of America, and White County Bridge Commission ex rel. United States of America*[1] v. *the White County Bridge Commission; Roy Clippinger, for Manager and Commissioner; J. Madison Pomeroy, Commissioner; Lenna A. Kern, Administrator of the Estate of Julius C. Kern, former Commissioner; and Carmi Times Publishing Company, a corporation.*"

The complaint rests jurisdiction upon 28 U. S. C. A. § 1345 and Public Law 37, 77th Congress, Act of April 12, 1941. This Act established the White County Bridge Commission. It authorized the Commission to establish a bridge over the Wabash River and fix tolls for its use, the funds obtained to be used to pay the costs of maintaining, repairing and operating the bridge. Plaintiff alleges that the defendant Commissioners breached their fiduciary relationship and expended $69,101.74 of moneys received from tolls for improper and wrongful purpose for the benefit of their private interests, and that defendants Clippinger and Carmi Times Publishing Company received

1. The government in its brief has failed to explain why the White County Bridge Commission *ex rel.* United States of America is a party plaintiff in this manner.

funds illegally, thereby wrongfully diverting this money from its prescribed statutory use. The complaint demands a judgment for these amounts against the defendants for the White County Bridge Commission, and also seeks the removal of Commissioner J. Madison Pomeroy, and the appointment of his successor as this court shall direct, and any further relief that the court may deem just and proper.

Public Law 37 provides for the operation of the bridge and Section 8 provides in part as follows:

> For the purpose of carrying into effect the objects stated in this Act, there is hereby created the White County Bridge Commission and by that name, style, and title said body shall have perpetual succession; may contract and be contracted with, sue and be sued, implead, and be impleaded, complain and defend in all courts of law and equity; * * * and shall have and possess all powers necessary, convenient, or proper for carrying into effect the objects stated in this Act.

Congress then appointed the original Commissioners by the Act and provided:

> * * * Any vacancy occurring in said commission by reason of failure to qualify * * * or by reason of death or resignation, shall be filled by the Federal Works Administrator.[2]

Section 11 provides in part:

> Nothing herein contained shall be construed to authorize or permit the commission or any member thereof to create any obligation or incur any liability other than such obligations and liabilities as are dischargeable solely from funds provided by this Act.

Section 12 provides:

> All provisions of this Act may be enforced or the

2. Secretary of Commerce has replaced Federal Works Administrator. Title 5 U. S. C. A. § 133z-15, Reorganization Plan No. 7.

violation thereof prevented by mandamus, injunction, or other appropriate remedy brought by the attorney general for the State of Illinois, the attorney general for the State of Indiana, or the United States District attorney for any district in which the bridge may be located in part, in any court having competent jurisdiction of the subject matter and of the parties.

The United States District Attorney for the Eastern District of Illinois is the proper party to enforce the Act. *Borah* v. *White County Bridge Commission*, 7 Cir., 1952, 199 F. 2d 213. In the second amended complaint the United States asked that a writ of mandamus issue to the Commission to compel it to bring an action to recover the funds illegally expended. This method of procedure was omitted in the third amended complaint, no doubt because the United States District Court does not have original jurisdiction in mandamus. *Marshall* v. *Crotty*, 1 Cir., 1950, 185 F. 2d 622.

The first question presented is whether or not the United States District Attorney has the authority under the Act to bring the action for the Commission in its name without mandamus, or without the authorization to do so by the Commission. Congress, in Section 12, does not spell out that the "Act may be enforced or the violation thereof prevented" by the United States District Attorney in the name of the Bridge Commission. This section provides the further limitation that any action brought must be commenced "in any court having competent jurisdiction of the subject matter and of the parties." Thus, the Act does not enlarge the jurisdiction of the district court to permit an original suit in mandamus. If Congress has intended to give authority to the district attorney to bring the action in the name of the Commission to recover funds illegally expended it could have easily so stated. The statement in the statute that mandamus may be used by

the United States District Attorney in enforcing the Act negatives the authority to sue in the name of the Commission.

Since the United States is not the owner of more than one-half of the capital stock of the Bridge Commission, the jurisdiction of the district court is not enlarged by 28 U. S. C. A. § 1349. See Cyclopedia Federal Procedure, Third Edition, Vol. 2, §§ 2.409, 2.410, p. 98 *et seq.* Section 1345, Title 28 U. S. C. A. gives this court jurisdiction of certain actions by the district attorney to enforce the Act, for example, injunction, but again does not enlarge the authority of this court to grant relief in mandamus, nor does it entitle the United States to bring the action for the Commission without first bringing a mandamus suit. The United States itself has no interest in the funds alleged to be wrongfully expended. Rule 17, Fed. Rules Civ. Proc. provides in part:

> (a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; * * * and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States.

The real party in interest in this suit is the White County Bridge Commission and Congress did not provide for an action for the use and benefit of the Commission in the name of the United States. In fact, Public Law 37 establishes the Commission as a corporate entity and provided in Section 8 that it "may * * * sue and be sued" in its own name.

The next issue presented is whether this court within its equitable powers has jurisdiction to remove a commissioner. As a general rule the power of appointment to a public office carries with it the right of removal. *Burnap v. United States*, 252 U. S. 512, 64 L. ed. 694; *Levy v. Woods*, C. A. D. C., 1948, 171 F. 2d 145. Public Law 37

gives no authority to this court to remove or appoint a commissioner. There is no inherent power in the court to remove an officer. C. J. S., Vol. 67, par. 67(a), p. 288. A court of equity generally has no jurisdiction over the removal of a public officer. See *Walton* v. *House of Representatives*, 265 U. S. 487, 490. Inasmuch as Congress expressly appointed the Commissioners and provided by Section 8 of Public Law 37 that "(a)ny vacancy occurring in said Commission by *reason of failure to qualify* * * * *or by reason of death or resignation, shall be filled by the Federal Works Administrator.*" Congress reserved the power of appointment and removal except under the circumstances set forth. (Emphasis supplied.)

This court concludes that whatever remedy exists in this case the action must be brought by the Bridge Commission in its name for its benefit since it is entitled to the funds which may have been wrongfully expended. One who received funds illegally from the Commission should be compelled to return it, and if a Commissioner has violated his duty he should be required to answer for his illegal acts. However, this court has been unable to find any relief which might be granted on this complaint. Therefore, the motion to dismiss is allowed, and the complaint is dismissed. IT IS SO ORDERED.

Entered this 5th day of March, 1959.

CASPER PLATT,
United States District Judge.

COURT OF APPEALS OPINION.

(Caption Omitted.)

January 11, 1960.

Before HASTINGS, *Chief Judge*, DUFFY, *Circuit Judge*, and GRUBB, *District Judge*.

GRUBB, *District Judge*. This is an appeal from a dismissal of the complaint in an action instituted by the United States Attorney, on behalf of the named plaintiffs, seeking a money judgment, removal from office of defendant Pomeroy, and for any other relief the court may deem just and proper.

The White County Bridge Commission was created by Congress, Act of April 12, 1941, Public Law 37, 55 Stat. 140, for the purpose of acquiring, maintaining, and operating a bridge across the Wabash River between Illinois and Indiana. The Act authorized the acquisition by private borrowing, to be repaid from tolls collected for that use, and for the added purpose of providing a fund sufficient for the maintenance and operation of the bridge until such time as all interests therein were conveyed to Illinois and Indiana, respectively.

The Commission was established as a body corporate and politic with power to sue and be sued. The Act designates the original Commissioners, among them defendant Pomeroy and the late Julius Kern. Vacancies on the Commission are to be filled by appointment by a designated member of the executive department of the United States.[1]

1. Under Title 5 U. S. C. A. § 133z-15, Reorganization Plan No. 7, the Secretary of Commerce is now the appointing officer.

Section 12 of Public Law 37 provides:

> "All provisions of this Act may be enforced or the violation thereof prevented by mandamus, injunction, or other appropriate remedy brought by the attorney general for the State of Illinois, the attorney general for the State of Indiana, or the United States district attorney for any district in which the bridge may be located, in part, in any court having competent jurisdiction of the subject matter and of the parties."

This court notes the Report of the Select Committee to Conduct an Investigation and Study of the Financial Position of the White County Bridge Commission, House Report No. 2052; 84th Congress, 2d Session (1956), pursuant to House Res. 244.

According to the Report, an audit of the accounts and records of the White County Bridge Commission requested by the Select Committee and conducted by the Comptroller General of the United States under date of September 29, 1955, calls attention to:

> "(1) the dual capacities in which Roy Clippinger, the commission manager, served, particularly during the 1950-55 period, in that as bridge manager he made purchases of commodities and placed advertising for the commission of and with himself, he being the largest stockholder and manager, editor, and publisher of the Carmi Times, a newspaper published in Carmi, Ill., in which newspaper office the White County Bridge Commission had its office, and (2) the failure of the bridge manager to purchase supplies at the most economical and lowest prices obtainable, his paying insurance premiums on an automobile owned, registered, and titled in the name of and used by the Carmi Times, purchasing various items for the Bridge Commission which have been used by the Carmi Times, and various other transactions detailed in the report."

The audit further alleges and the Report details a

number of apparently questionable expenditures involving payments to the Carmi Times Publishing Co., "the ownership and management of which is closely tied in with the management of the White County Bridge Commission."

In respect to the then present condition, the Report states that the purchase bonds were paid off in July, 1955, and that thereafter the State of Illinois, directly, and the State of Indiana, indirectly, indicated that they would not consider taking the bridge in its "present unsafe condition." The unsafe condition apparently is one of structural unsoundness, in part correctable by river channel improvements contemplated by the Army engineers, and in part due to the condition of the bridge itself.

As to the possibilities of the bridge becoming free of tolls, the report concludes that unless certain financial solutions could be worked out with the States, the United States Bureau of Public Roads owed it to the public which uses this bridge to take it over and operate it.

> "When Congress created this Commission it impliedly assured the public that when the bonds were retired the bridge would be free of tolls. * * * As long as the present Commission and its manager operate the bridge it will never be free of tolls."

The Select Committee raised certain other significant considerations, as for example:

> "It may also be apparent that the kind of activities in which the manager indulged in getting the bill through Congress are being continued by him with a view of keeping the bridge under control and preventing it from becoming a free bridge. If there had not been diversion of Commission funds of more than $69,000, that money would go a long way in the direction of making the bridge acceptable to the States. The Commission purchased a supply of Hadacol. The committee was unable to learn who drank the Hadacol.

"There is still another thing that may be wondered about—whether the acts of the Commissioners and the bridge manager do not indicate a common purpose, a breathing together, to thwart the intention of the Congress with respect to eventually having this bridge free of tolls, and to deprive the United States of its right to have this Bridge Commission administered 'according to Hoyle,' free, open and above-board, always in the best interests of the Commission, and not have its funds diverted to purposes and uses other than paying off the purchase bonds, taking care of and operating the bridge."

The Report also notes that:

"* * * the manager and at least two of the Commissioners have made money out of it from not only their salaries, but as they are financially interested in the Carmi Times Publishing Co. and the manager threw fat and juicy business to that newspaper, they profited additionally and personally. This is the conflict of interest which has been developed by the committee's investigation * * *."

The Committee recommended, among other things, that the Act be amended to provide for an annual audit of the Commission's books and records by the Comptroller General of the United States, that the terms of office of the Commissioners be declared vacant and new members be appointed for a statutory term, and:

"B. That the attorneys general of the States of Illinois and Indiana and the United States attorneys in districts in which any part of the bridge exists, who are authorized by the act creating the Commission to act in enforcing all provisions of the act, be advised of the findings of this select committee, so that they or any of them may take whatever appropriate action they or either of them deem proper."

The third amended complaint in this action which is before this court on the appeal rests jurisdiction on

Section 12 of the Act, *supra*, and on Section 1345, Title 28 U.S.C.A.[2]

Count I alleges that this is a civil action to recover funds collected by the Commission and misapplied by defendants. It further alleges that defendants breached a fiduciary duty in failing to maintain, repair, and operate the bridge under economical management in that certain amounts of tolls collected were not properly used for the maintenance, repair, and operation of the bridge but were used for improper and wrongful purposes for the benefit of the private interests of all of the defendants; and that the defendants, by their failure to utilize properly the tolls collected and by their improper and wrongful expenditures, have diverted a certain sum and have been wrongfully and unjustly enriched in that amount. As a result of said conduct by the defendants, the Commission has been deprived of said amount which would otherwise be available to the Commission for the purpose of repair and maintenance of the bridge.

Count II alleges that the conduct asserted in Count I resulted partially from Commissioner Pomeroy's breach of duty in that he did not faithfully perform the duties imposed upon him by the Act but, rather, that he knowingly allowed such wrongful expenditures; and that Pomeroy was unjustly enriched by the wrongful expenditures of the Commission's funds.

The United States demands judgment against the defendants and on behalf and for the account of the Commission for funds wrongfully diverted and for removal of Commissioner Pomeroy and appointment of a successor Commissioner.

---

2. § 1345. "United States as plaintiff—Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

Exhibit B to the Third Amended Complaint entitled "Recapitulation of Ascertainable Financial Detriment to the Commission and Corresponding Benefit to Roy Clippinger's Interests and to the Benefit of the Carmi Times Publishing Company, an Illinois Corporation," consists of various items of expenditures totaling $69,101.74.

The District Court dismissed the complaint on the ground that the Commission was the real party in interest and that there was no authority under the Act creating the Commission for the United States Attorney to bring the action without authorization to do so by the Commission, and that the court was unable to find any relief which might have been granted on this complaint.

On the appeal, the government conceded the dismissal of the complaint as to Lenna A. Kern, administrator of the estate of Julius C. Kern, former Commissioner.

The White County Bridge Commission was previously before this court on an appeal from a dismissal of a complaint for declaratory judgment in an action by a toll payer and user of the toll bridge, who sought to examine the records of the operation of the bridge in *Borah* v. *White County Bridge Commission*, 199 F. 2d 213 (7th Cir. 1952). This court, in affirming the dismissal, held that the plaintiff could not be heard to complain against a public or quasi-public corporation or its officers, and that his remedy must be sought through those representing the public.

Section 12 has been included in Public Law 37 for the purpose of safeguarding the interests of that section of the public which has equitable interests in the assets of the Commission since it has been designated by Congress as the intended ultimate owner of the bridge and of any funds remaining in the hands of the Commission at the termination of its existence.

The officials authorized under Section 12 to maintain actions are proper persons to represent the section of the public involved here; that is, the citizens of the States or districts where the bridge is physically located. Since the States of Illinois and Indiana have not as yet accepted the bridge, it is appropriate that the United States Attorney for one of the districts involved act on the recommendation of the Select Committee and take such appropriate action as he may deem proper. Although the action is brought in the interest of protecting certain public rights, the United States is the plaintiff in such an action and the District Court is the proper forum.

The remedies enumerated in Section 12 traditionally may be used for enforcing or challenging official conduct. However, mandamus, an extraordinary writ, may not be entertained in the federal District Courts under these circumstances.

The function of the equitable remedy of injunction, also listed in the Section, is "preventive, prohibitory, protective, or restorative, as the law and circumstances of the case warrant." *Moore's Federal Practice*, Section 65.04 (1) citing 4 *Pomeroy's Equity Jurisprudence* (5th ed. 1941), §1337.

The allegations of the complaint, to be taken as true on motion for dismissal, state that "* * * defendants * * * failed to maintain, repair, and operate the bridge under economical management in that at least $69,101.74 of tolls collected were not properly used for the maintenance, repair or operation of the bridge but were used for improper and wrongful purposes for the benefit of the private interests of all of the defendants." These allegations assert a claim based on a violation of Public Law 37 wherein the Commission is charged with the economical management in maintaining, repairing, and operating the bridge and its approaches, as well as on a violation of

the provisions of said law that "All tolls and other revenues from said bridge are hereby pledged to such uses and to the application thereof as hereinafter in this section required." The Act does not authorize the use of such funds for the personal benefit of any of the persons made defendants in this action.

The government's demand for judgment does not expressly seek the equitable remedy of injunction but asks for restitution and for any other relief the court may deem just and proper. Its theory of recovery rests on incidental relief and fails to encompass the whole of the remedy available to it to prevent a violation of Public Law 37.

This limited conception as to the proper theory of recovery is not fatal in this action. Rule 8, Federal Rules of Civil Procedure, 28 U. S. C. A., governing the general rules of pleading, requires of the pleader that he make "* * *(3) a demand for judgment for the relief to which he deems himself entitled."

The general rule in appraising the sufficiency of a complaint for failure to state a claim is that a complaint should not be dismissed "* * * unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U. S. 41, 45, 46 (1957); *Seymour* v. *Union News Company*, 217 F. 2d 168 (7th Cir. 1954); and see Rule 54(c), Demand for Judgment, Federal Rules of Civil Procedure, 28 U. S. C. A.: "* * * every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

The general principle that pleadings are intended "to serve as a means of arriving at fair and just settlements of controversies between litigants" is firmly established.

Maty v. *Grasselli Co.*, 303 U. S. 197, 200 (1938). To that end they are to be construed liberally in favor of the pleader. The theory of the complaint is to be determined by its main and material allegations. *First Nat. Bank of Colorado Springs* v. *McGuire*, 184 F. 2d 626 (7th Cir. 1950). A pleading is judged by its substance and not its form. Thus, actions erroneously brought at law may be transferred to equity. See *Kerrigan's Estate* v. *Joseph E. Seagram & Sons*, 199 F. 2d 694 (3rd Cir. 1952).

If proof of the government's claim establishes a substantial portion of the findings of the Select Committee, plaintiff, United States of America, is entitled to the remedy of injunction and, incidental thereto, to an accounting and restitution as against all parties participating in the violation of Public Law 37. The United States Attorney is authorized by the Act to bring such an action, and the District Court has authority to entertain the case. However, the White County Bridge Commission is not a proper party plaintiff herein, and the action should be maintained in the name of the United States alone. In equity the court may restore misappropriated funds to the proper party regardless of whether this party is lined up as plaintiff or defendant in the action.

The government is not entitled to relief on its demand for removal of a Commissioner and the appointment of a successor Commissioner. Congress itself appointed the original Commissioners and designated where power of appointment lies to fill vacancies on the Commission. Public Law 37 does not authorize the bringing of an action seeking the removal of these officials. Generally the power to appoint public officials carries with it the power of removal. *Burnap* v. *United States*, 252 U. S. 512 (1920), and *Myers* v. *United States*, 272 U. S. 52 (1926). It is also a general rule that the courts have no

jurisdiction to remove a public official unless so authorized by statute. *Walton v. House of Representatives*, 265 U. S. 487 (1924); 67 C. J. S. 288.

For the foregoing reasons the order of the District Court dismissing the complaint is hereby affirmed in part and reversed in part, and the case is remanded for further proceedings not inconsistent with this opinion.

COURT OF APPEALS OPINION ON PETITIONS FOR REHEARING.

(Caption Omitted.)

OPINION ON PETITIONS FOR REHEARING.

March 21, 1960

Before HASTINGS, *Chief Judge*; DUFFY, *Circuit Judge*, and GRUBB, *District Judge*.

GRUBB, *District Judge*. The White County Bridge Commission, Commissioner J. Madison Pomeroy, Carmi Times Publishing Company, and Roy Clippinger petition this court for a rehearing in the above-entitled cause. The grounds upon which said petitions are based do not warrant the granting of the relief demanded.

The decision in this cause is based on the allegations of the government's complaint. These were determined to be sufficient to state a cause of action for equitable relief as provided for by the statute creating the White County Bridge Commission, Public Law 37, 55 Stat. 140. With respect to the Select Committee Report noted by the court, we observed that *should* proof under the allegations of the complaint establish a substantial portion of the findings of the Report, the government would be entitled to the relief requested.

Since this court determined that the complaint in this action was for equitable relief to remedy a violation of Public Law 37, there is a basis for relief against the Commission insofar as it may be charged with a presently continuing violation of that statute in the alleged mis-

management of the affairs of the bridge. Failure to recover and properly allocate funds diverted from their pledged use may constitute a continuing violation. Restoration of the illegally diverted funds to the Commission which is the legal title holder of the assets of the bridge would not of itself cure the alleged mismanagement in violation of the statute.

Where a complaint alleges facts from which the court may reasonably infer lack of an adequate remedy at law or irreparable injury, the want of express allegations thereof is not fatal. This complaint alleges that the defendants failed to maintain, repair, and operate the bridge under economical management in that some of the tolls collected were diverted from their proper use. These allegations state facts constituting a violation of Public Law 37 which, under the terms of that statute, may be prevented by "mandamus, injunction or other appropriate remedy." By nature, this is an action to enforce or protect a beneficial equitable interest of the public in the bridge and its assets. It has been conceded that mandamus does not lie in the District Court. Defendants have consistently contended that the term "other appropriate remedy" must be construed so as to preclude the legal remedy of restitution based on a theory of unjust enrichment. Petitioners fail to point out a legal remedy maintainable in the federal courts adequate to restrain alleged facts constituting continuing violations of the law by the Commission and other defendants, or to protect the public interest. Cf. *Humble Oil & Refining Co. v. Sun Oil Co.*, 191 F. 2d 705 (5th Cir. 1951), cert. den. 342 U. S. 920.

Injury to a beneficial estate through mismanagement of assets, not remediable by an action at law, is irreparable for the purposes of the law of injunctions. See 28 Am. Jur. Injunctions, Section 48.

Count I of the complaint is directed at all defendants.

Commissioner Pomeroy allegedly participated in the acts which may be in violation of Public Law 37. The complaint, therefore, states an equitable claim against Commissioner Pomeroy as well as against the Commission.

Petitioners proceed on the assumption that the complaint herein states a legal claim or possibly a claim for equitable relief in aid of the legal action. This assumption rests on a misinterpretation of this court's decision. The basis of this claim lies in equity, and the remedy is equitable. There is no constitutional right to a trial by jury in an equitable action.

The petitions for rehearing are hereby denied.

PUBLIC LAW 37.

Act of April 12, 1941, P.L. 37, 55 Stat. 140:

> To create the White County Bridge Commission; defining the authority, power, and duties of said Commission; and authorizing said Commission and its successors and assigns to purchase, maintain, and operate a bridge across the Wabash River at or near New Harmony, Indiana, and to purchase, maintain and operate certain ferries.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to facilitate interstate commerce, improve the Postal Service, and provide for military and other purposes, the White County Bridge Commission (hereinafter created and hereinafter referred to as the "commission") and its successors and assigns be, and is hereby authorized to acquire, by purchase or otherwise, from its owners, and to maintain and operate a bridge and approaches thereto across the Wabash River at or near the city of New Harmony, Indiana, in accordance with the

provisions of the Act entitled "An Act to regulate the construction of bridges over navigable waters", approved March 23, 1906, and subject to the conditions and limitations contained in this Act. For like purposes said commission and its successors and assigns are hereby authorized to acquire, maintain, and operate all or any ferries across the Wabash River within one mile of said bridge, subject to the conditions and limitations contained in this Act.

SEC. 2. There is hereby conferred upon the commission and its successors and assigns the right and power to acquire, condemn, occupy, possess, and use said bridge and such real estate and other property in the State of Illinois and the State of Indiana as may be needed for the acquisition and maintenance of such bridge and its approaches, upon making just compensation therefor, to be ascertained and paid according to the laws of the State in which such real estate or other property is situated, and the proceedings therefor shall be the same as in the condemnation of private property for public purposes in said State, respectively.

SEC. 3. The commission and its successors and assigns are hereby authorized to fix and charge tolls for transit over such bridge and such ferry or ferries in accordance with the provisions of this Act, subject to the approval of the Secretary of War as provided by the Act of Congress approved March [illegible], 1906.

SEC. 4. The commission and its successors and assigns are hereby authorized to provide for the payment of the cost of such bridge as may be acquired and its approaches (including any approach highways which, in the judgment of the commission, it is necessary or advisable to construct or cause to be constructed to provide suitable and adequate connection with existing improved highways) and such ferry or ferries as may be acquired and the necessary land,

easements, and appurtenances thereto by an issue or issues of negotiable bonds of the commission, bearing interest at the rate of not more than 6 per centum per annum, the principal and interest of which bonds and any premium to be paid for retirement thereof before maturity shall be payable solely from the sinking fund provided in accordance with this Act and such payments may be further secured by mortgage of such bridge and its approaches. Such bonds may be registrable as to principal alone or both principal and interest, shall be in such form not inconsistent with this Act, shall mature at such time or times not exceeding twenty years from the date of approval of this Act, shall be in such denominations, shall be executed in such manner, and shall be payable in such medium and at such place or places as the commission may determine. The commission may repurchase and may reserve the right to redeem all or any of said bonds before maturity in such manner and at such price or prices, not exceeding 105 per centum of the principal amount thereof and accrued interest, as may be fixed by the commission prior to the issuance of the bonds. The commission, when it deems it to the best interest of the commission, may issue refunding bonds to repurchase and redeem any outstanding bonds, before the maturity thereof, which it may issue: *Provided*, That the refunding bonds shall mature at such time or times, not exceeding twenty-five years from the date of approval of this Act, as the commission may determine. The commission may enter into an agreement with any bond or trust company in the United States as trustee having the power to make such agreement, setting forth the duties of the commission in respect of the maintenance, operation, repair, and insurance of the bridge and/or the ferry or ferries, the conservation and application of all funds, the security for the payment of the bonds, the safeguarding of money on hand or on deposit,

and the rights and remedies of said trustee and the holders of the bonds, restricting the individual right of action of the bondholders as is customary in trust agreements respecting bonds of corporations. Such trust agreement may contain such provisions for protecting and enforcing the rights and remedies of the trustee and the bondholders as may be reasonable and proper and not inconsistent with the law.

Said bonds shall be sold in such manner and at such time or times and at such prices as the Commission may determine, but no such sale shall be made at a price so low as to require the payment of more than 6 per centum interest on the money received therefor, computed with relation to the absolute maturity of the bonds in accordance with standard tables of bond values, and the face amount thereof shall be so calculated as to produce, at the price of their sale, the cost of the bridge and its approaches and the land, easements, and appurtenances used in connection therewith, and in the event the ferry or ferries are to be acquired, also the cost of such ferry or ferries and the lands, easements, and appurtenances used in connection therewith. The cost of the bridge and approaches and approach highways, and ferry or ferries, shall be deemed to include all engineering, legal, architectural, traffic surveying, and other expenses incident to the acquisition of the bridge or the acquisition of the ferry or ferries, and the acquisition of the necessary property, and incident to the financing thereof: *Provided*, That the cost of acquisition of said bridge and approaches and approach highways, and ferry, shall not exceed the sum of $945,000. If the proceeds of the bonds issued shall exceed the cost as finally determined, the excess shall be placed in the sinking fund hereinafter provided. Prior to the preparation of definitive bonds the Commission may, under like restrictions, issue temporary

bonds or interim certificates with or without coupons of any denomination whatsoever, exchangeable for definitive bonds when such bonds that have been executed are available for delivery.

SEC. 5. In fixing the rates of toll to be charged for the use of such bridge the same shall be so adjusted as to provide a fund sufficient to pay for the reasonable cost of maintaining, repairing, and operating the bridge and its approaches under economical management, and to provide a sinking fund sufficient to pay the principal and interest of such bonds as the same shall fall due and the redemption or repurchase price of all or any thereof redeemed or repurchased before maturity as herein provided. All tolls and other revenues from said bridge are hereby pledged to such uses and to the application thereof as hereinafter in this section required. After payment or provision for payment therefrom of all such cost of maintaining, repairing, and operating and the reservation of an amount of money estimated to be sufficient for the same purpose during an ensuing period of not more than six months, the remainder of tolls collected shall be placed in the sinking fund, at intervals to be determined by the commission prior to the issuance of the bonds. An accurate record of the cost of the bridge and its approaches; the expenditures for maintaining, repairing, and operating the same; and of the daily tolls collected, shall be kept and shall be available for the information of all persons interested. The commission shall classify in a reasonable way all traffic over the bridge, so that the tolls shall be so fixed and adjusted by it as to be uniform in the application thereof to all traffic falling within any such reasonable class, regardless of the status or character of any person, firm, or corporation participating in such traffic, and shall prevent all use of such bridge for traffic except upon payment of the tolls so fixed and adjusted. No toll shall be charged officials or

employees of the commission or the Government of the United States or any State, county, or municipality in the United States while in the discharge of their duties, or municipal police or fire departments when engaged in the proper work of any such department.

SEC. 6. Nothing herein contained shall require the commission or its successors to maintain or operate any ferry or ferries purchased hereunder, but in the discretion of the commission or its successors any ferry or ferries so purchased, with the appurtenances and property thereto connected and belonging, may be sold or otherwise disposed of or may be abandoned and or dismantled whenever in the judgment of the commission or its successors it may seem expedient so to do. The commission and its successors may fix such rates of toll for the use of such ferry or ferries as it may deem proper, subject to the same conditions as are hereinabove required as to tolls for traffic over the bridge. All tolls collected for the use of the ferry or ferries and the proceeds of any sale or disposition of any ferry or ferries shall be used, so far as may be necessary, to pay the cost of maintaining, repairing, and operating the same, and any residue thereof shall be paid into the sinking fund hereinabove provided for bonds. An accurate record of the cost of purchasing the ferry or ferries; the expenditures for maintaining, repairing, and operating the same; and of the daily tolls collected shall be kept and shall be available for the information of all persons interested.

SEC. 7. After payment of the bonds and interest, or after a sinking fund sufficient for such payment shall have been provided and shall be held for that purpose, the commission shall deliver deeds or other suitable instruments of conveyance of the interest of the commission in and to the bridge, that part within Illinois to the State of Illinois or any municipality or agency thereof as may be authorized

by or pursuant to law to accept the same (hereinafter referred to as the Illinois interests) and that part within Indiana to the State of Indiana or any municipality or agency thereof as may be authorized by or pursuant to law to accept the same (hereinafter referred to as the Indiana interests), under the condition that the bridge shall thereafter be free of tolls and be properly maintained operated, and repaired by the Illinois interests and the Indiana interests, as may be agreed upon; but if either the Illinois interests or the Indiana interests shall not be authorized to accept or shall not accept the same under such conditions, then the bridge shall continue to be owned, maintained, operated, and repaired by the commission, and the rates of tolls shall be so adjusted as to provide a fund of not to exceed the amount necessary solely for the proper maintenance, repair, and operation of the bridge and its approaches under economical management, until such time as both the Illinois interests and the Indiana interests shall be authorized to accept and shall accept such conveyance under such conditions. If at the time of such conveyance the commission or its successors shall not have disposed of such ferry or ferries, the same shall be disposed of by sale as soon as practicable at such price and upon such terms as the commission or its successors may determine.

SEC. 8. For the purpose of carrying into effect the objects stated in this Act there is hereby created the White County Bridge Commission, and by that name, style, and title said body shall have perpetual succession; may contract and be contracted with, sue and be sued, implead and be impleaded, complain and defend in all courts of law and equity; may make and have a common seal; may purchase or otherwise acquire and hold or dispose of real estate and other property; may accept and receive donations or gifts of money or other property and apply same to the purposes of this Act; and shall have and possess all powers nec-

essary, convenient, or proper for carrying into effect the objects stated in this Act.

The commission shall consist of Julius C. Kern, Jennings F. Marlin, and J. Madison Pomeroy, all of Carmi, Illinois. Such commission shall be a body corporate and politic. Each member of the commission shall qualify within thirty days after the approval of this Act by filing in the office of the Federal Works Administrator an oath that he will faithfully perform the duties imposed upon him by this Act, and each person appointed to fill a vacancy shall qualify in like manner within thirty days after his appointment. Any vacancy occurring in said commission by reason of failure to qualify as above provided, or by reason of death or resignation, shall be filled by the Federal Works Administrator. Before the issuance of bonds as hereinabove provided, each member of the commission shall give such bond as may be fixed by the Commissioner of Public Roads, conditioned upon the faithful performance of all duties required by this Act. The cost of such bonds shall be deemed an operating expense of the commission. The commission shall elect a chairman and a vice chairman from its members, and may establish rules and regulations for the government of its own business. A majority of the members shall constitute a quorum for the transaction of business.

SEC. 9. The commission shall have no capital stock or shares of interest or participation, and all revenues and receipts thereof shall be applied to the purposes specified in this Act. The members of the commission shall be entitled to compensation for their services, but the maximum compensation of the chairman in any year shall not exceed $1,200 and of each other member in any year shall not exceed $600. The members of the commission shall also be entitled to receive traveling expense allowance of 10 cents a mile for each mile actually traveled on the business

of the commission. The commission may employ a secretary, treasurer, engineers, attorney, and other such experts, assistants, and employees as they may deem necessary, who shall be entitled to receive such compensation as the commission may determine. All salaries and expenses shall be paid solely from the funds provided under the authority of this Act. After all bonds and interest thereon shall have been paid and all other obligations of the commission paid or discharged, or provision for all such payment shall have been made as hereinbefore provided, and after the bridge shall have been conveyed to the Illinois interests and the Indiana interests as herein provided, and any ferry or ferries shall have been sold, the commission shall be dissolved and shall cease to have further existence by an order of the Commissioner of Public Roads made upon his own initiative or upon application of the commission or any member or members thereof, but only after a public hearing in the city of Carmi, Illinois, notice of the time and place of which hearing and the purpose thereof shall have been published once, at least thirty days before the date thereof, in a newspaper published in the city of Carmi. At the time of such dissolution all moneys in the hands of or to the credit of the commission shall be divided into two equal parts, one of which shall be paid to said Illinois interests and the other to said Indiana interests.

SEC. 10. Notwithstanding any of the provisions of this Act, the commission shall have full power and authority to negotiate and enter into a contract or contracts with the State Highway Department of Illinois and the State Highway Commission of Indiana, whereby said highway departments or either of them may operate, and maintain or participate with the commission in the operation and maintenance of said bridge and approaches.

SEC. 11. Nothing herein contained shall be construed

to authorize or permit the commission or any member thereof to create any obligation or incur any liability other than such obligations and liabilities as are dischargeable solely from funds provided by this Act. No obligation created or liability incurred pursuant to this Act shall be an obligation or liability of any member or members of the commission but shall be chargeable solely to the funds herein provided, nor shall any indebtedness created pursuant to this Act be an indebtedness of the United States.

SEC. 12. All provisions of this Act may be enforced or the violation thereof prevented by mandamus, injunction, or other appropriate remedy brought by the attorney general for the State of Illinois, the attorney general for the State of Indiana, or the United States district attorney for any district in which the bridge may be located in part, in any court having competent jurisdiction of the subject matter and of the parties.

SEC. 13. Notwithstanding any of the provisions of this Act the commission, in its discretion, shall have power at any time to sell, transfer and convey such bridge and approaches thereto either to the State of Illinois or the State of Indiana, or to any public agency, or any political subdivision of either of such States within or adjoining which any part of such bridge is located, or any two or more of them jointly: *Provided, however*, That if such bridge shall be sold, transferred and conveyed to the States or public agencies or political subdivisions thereof or to either of them, and if tolls are thereafter charged for the use thereof, the rates of toll shall be so adjusted as to provide a fund sufficient to pay for the reasonable cost of maintaining, repairing, and operating the bridge and its approaches under economical management and to provide a sinking fund sufficient to amortize the amount paid therefor, including reasonable interest and financing costs, as soon as possible under reasonable charges, but within a period of

not to exceed twenty years from the date of acquiring the same, and after a sinking fund sufficient for such amortization shall have been so provided such bridge shall thereafter be maintained and operated free of tolls. In the event of the acquisition of such bridge pursuant to the provisions of this section, an accurate record of the amount paid for the acquisition of the bridge and its approaches, the actual expenditures for maintaining, repairing, and operating the same, and the daily tolls collected shall be kept and shall be available for the information of all persons interested. No such sale, transfer, or conveyance shall be made except for a consideration sufficient to enable the commission to retire all of its outstanding bonds and obligations and unless prior to or simultaneously with such sale, transfer, and conveyance all outstanding bonds of the commission shall be called for redemption and moneys sufficient to effect such redemption deposited and irrevocably pledged for that purpose.

SEC. 14. The right to alter, amend, or repeal this Act is hereby expressly reserved.

Approved, April 12, 1941.